HAIRUL HISHAM SALIM

v.

DATO' ZAINAL ABIDIN ZIN & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CRIMINAL APPLICATION NO: (MT-1) 44-01-2001]
8 NOVEMBER 2002

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Preventive detention - Whether detention order bad in law - Words "amongst others" in detention order - Effect - Whether Minister not furnishing fully grounds of detention - Inordinate time lag between criminal activities and detention order - Delay not explained for - Whether fatal - Whether habeas corpus to issue - Dangerous Drugs (Special Preventive Measures) Act 1985, s. 6(1) - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(3)(c), 4(1) & (4)(b), 5 - Federal Constitution, art. 151*

This was an application by the applicant for a writ of *habeas corpus* to issue against the respondents, and for him to be released forthwith from detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Emergency Ordinance'), on the grounds that: (i) the detention order as issued by the first respondent Minister under s. 4(1) of the Emergency Ordinance, by reason of the words "di antara" or "amongst others" therein, had not fully furnished the grounds upon which the order was based and had therefore contravened s. 4(4)(b) of the Emergency Ordinance; and (ii) the detention order was bad in law because of the significant lag of time between the prejudicial criminal activities of the applicant and the detention order. It was not in dispute that the phrase "di antara" was used in the detention order and that there was a lapse of 21 months between the last criminal activity of the applicant and the issuance of the detention order. The facts notwithstanding, the respondents argued, *inter alia*, that the legality of the detention could not be challenged on the basis that the detention was stale and too remote in point of time in relation to the detention order, as the Supreme Court in *Menteri Hal Ehwal Dalam Negeri Malaysia & Anor v. Chua Teck* had made clear that such a challenge goes to the question of sufficiency or relevancy of the facts which falls within the domain of the subjective satisfaction of the Minister and which the court is prohibited from inquiring. The applicant contended however that *Chua Teck*'s case was distinguishable and therefore not applicable to the

present case. Before the learned judge, the main questions that arose were: (i) whether the words "di antara" in the detention order showed that the Minister had furnished only a part of the grounds forming the basis of that order; and (ii) whether the lag of time between the criminal activities and the detention order herein placed an obligation on the Minister to explain the delay, and if so, whether his failure to do so was fatal to the detention order.

Held:

[1] The words "di antara" in the grounds of detention do not in any way suggest that the Minister has taken extraneous consideration in arriving at his subjective satisfaction when issuing the detention order. The evidence indeed points to the contrary as the Minister, in his affidavit, specifically affirmed that he had based his subjective satisfaction on the grounds which he had directed his officer to prepare. This showed that the Minister had specifically directed his mind to the six grounds in the detention order. In the context of the grounds supporting the detention order, the words "di antara" only gave a wider and all encompassing meaning to the detenu's diverse criminal activities. (pp 715 g-h & 716 a)

[2] *Chua Teck*'s case revolves around a detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 where, by virtue of the words "has been" in s. 6(1) thereof, the Minister is empowered to take into consideration the past association of the detenu with any activity relating to or involving in the trafficking in dangerous drugs. (p 718 a)

[2a] The Emergency Ordinance is a statute different from the Dangerous Drugs (Special Preventive Measures) Act 1985. There is a clear absence of the words "has been" in the relevant section of the Ordinance. And thus, by reason of the distinguishing feature, it can be safely said that *Chua Teck*'s case, in establishing that the question of staleness or remoteness goes to the question of sufficiency or relevancy of the facts and hence falling within the subjective satisfaction of the Minister, is only confined to cases of detention made pursuant to the Dangerous Drugs (Special Preventive Measures) Act 1985 and not to detentions made under any other statutes. (pp 718 h & 719 b-d)

[3] Since the objective of the Emergency Ordinance excludes consideration of past association of the detenu's criminal activities as falling exclusively within the subjective satisfaction of the Minister, the court is not precluded from questioning the staleness or remoteness of the detenu's criminal activities in relation to the detention order. (p 719 e)

[3a] There has been inordinate delay between the detention order and the criminal activities of the detenu which makes the Minister's subjective satisfaction not genuine or colourable. The Minister ought to have been alerted by point 6(i) of the applicant's affidavit which averred to the point of delay and ought to have furnished an explanation for that. This unfortunately the Minister failed to do. A writ of *habeas corpus* must in the circumstances be issued so as to set the applicant free. (pp 720 c-e & 721 b-c)

[Application allowed; order accordingly.]

Case(s) referred to:

Abdul Rahman Maidin v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2000] 3 CLJ 8 CA ***(refd)***

Malaysia Bar v. Tan Sri Dato' Abdul Hamid Omar [1989] 2 MLJ 281 ***(refd)***

Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v. Chua Teck [1990] 1 CLJ 220; [1990] 1 CLJ (Rep) 178 SC ***(dist)***

SK Serajul v. State of West Benjal AIR [1975] SC 1517 ***(refd)***

Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor [1988] 2 MLJ 638 ***(refd)***

Yong Pik Sing v. The Pengarah Pusat Pemulihan Akhlak & Anor & Other Applications [2000] 5 CLJ 58 HC ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, s. 6(1)

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), (4)(b), 5

Federal Constitution, arts. 151

For the applicant - Gobind Singh Deo (Zamri Idrus); M/s Karpal Singh & Co

For the respondents - Abdul Rani SFC, Ministry Home Affairs

Reported by WA Sharif

JUDGMENT

Syed Ahmad Helmy JC:

The applicant herein was detained under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (hereinafter referred to as the Emergency Ordinance) pursuant to a Detention Order dated 8 November 2001 issued under s. 4(1) of the Emergency Ordinance. By notice of motion in encl. 2 the applicant filed this application for a writ of *habeas corpus* to be issued against the respondents and for the applicant to be released forthwith.

The applicant advanced two grounds in support of the application as follows:

1. The detention order is invalid by reason of the paraphrasing by the insertion and usage of the words "di antara" or "amongst others" in the grounds of detention which usage of words tantamounts to furnishing a part only and not all of the allegations of facts upon which the detention order is based as required by s. 4(4)(b) of the Emergency Ordinance.

2. The detention order is bad in law because of the significant lag of time between the prejudicial criminal activities of the applicant and the detention order.

Coming to the first ground aforesaid it is the applicant's submission that by virtue of s. 4(4)(b) of the Emergency Ordinance, the Minister must furnish the detenu-applicant with those allegations of facts upon which the detention order is based and not only part of the allegations involved. The furnishing of all the allegations of facts is to give effect to the constitutional right of the detenu under art. 151 of the Federal Constitution and s. 5 of the Emergency Ordinance to make representations, the failure of which would prejudice the detenu. The presence of the words "di antara" it is submitted establishes that the detaining authority has chosen only to inform the detenu some and not all of the allegations of facts and as such runs afoul of s. 4 of the Emergency Ordinance which provides that the facts upon which the detention order is based must be communicated to the detenu. The applicant also advanced the argument that there was wrongful subjective consideration by the Minister as he was influenced not by the Alasan prepared by Che Murad Sayang bin Ramjan but rather the Laporan Penyiasatan or Inquiry Report prepared by ACP Abdul Rahim bin Haji Hanafi in coming to his subjective satisfaction of issuing the Detention Order.

On the presence of the words "di antara" in the grounds of detention it is my considered view that it does not affect the Detention Order. This is because the words, the English equivalent is "amongst others" cannot and do not in any way suggest or establish that the Minister has taken extraneous consideration in arriving at his subjective satisfaction of issuing the Detention Order. In point of fact the evidence is to the contrary as the Minister in his affidavit affirmed on 22 April 2002 in para. 7 thereof specifically affirmed that he based his subjective satisfaction on the grounds which he had directed the officer Che Murad Sayang bin Ramjan to prepare. This piece of evidence clearly establishes that the Minister far from taking into account extraneous consideration specifically directed and focused his mind to the six grounds appearing therein.

The presence of the words "di antara" to my mind in the context of the grounds supporting the Detention Order herein is to be interpreted as giving a wider and all encompassing meaning to the detenu's diverse criminal activities similar to the interpretation given to the conjunction "or" under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 by the Court of Appeal in *Abdul Rahman Maidin v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2000] 3 CLJ 8.

I must also emphasise that the six grounds upon which the Minister based the Detention Order does not in any way prejudice and/or curtail the applicant's constitutional right and the right conferred under s. 5 of the Emergency Ordinance to make representation.

On the detenu's counsel's argument that the Minister was influenced by the Inquiry Report prepared by ACP Abdul Rahim bin Haji Hanafi and not the alasan prepared by Che Murad Sayang bin Ramjan in coming to his subjective satisfaction of issuing the Detention Order is to my mind flawed and laced with confusion. This is because the Laporan Penyiasatan or Inquiry Report is a report which is required to be prepared under the provisions of s. 3(3)(c) of the Emergency Ordinance for the purpose of the initial detention of not exceeding 60 days under s. 3 thereof. The report itself relates to the investigation of the criminal activities of the detenu and is a requirement for the detaining authority to obtain to enable the detenu to be lawfully detained above the 30 day period in the initial detention period of 60 days without an detention order.

As I have found earlier that the Minister specifically directed his subjective satisfaction on the six grounds as prepared by Che Murad Sayang bin Ramjan as directed, the contention that the Minister was influenced by the Laporan Penyiasatan and not the Grounds of Detention must fail and I accordingly rule against the detenu's first ground of complaint.

The second ground challenging the legality of the detention as formulated by learned counsel for the applicant was the allegation of facts which constituted the basis of the applicant's detention were stale and too remote in point of time in relation to the date of the detention order and in the absence of a satisfactory explanation for the delay, the subjective satisfaction of the Minister is not genuine or colourable and relies on the case of *Yong Pik Sing v. The Pengarah Pusat Pemulihan Akhlak & Anor & Other Applications* [2000] 5 CLJ 58.

The respondent in the face of such challenge contended that the issue of staleness and remoteness goes to the question of sufficiency or relevancy of the facts an enquiry which the court is prohibited from embarking upon as it falls within the domain of the subjective satisfaction of the Minister and relies on the Supreme Court decision of *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v. Chua Teck* [1990] 1 CLJ 220; [1990] 1 CLJ (Rep) 178. By reason thereof and based on the principle of stare decisis, learned Federal Counsel submits that this court is bound by the Supreme Court's decision that staleness or remoteness of the allegations of fact goes to the question of sufficiency or relevancy of the facts and hence is beyond the ambit of the court's powers to inquire.

The principle of *stare decisis* encapsulates the doctrine that a *ratio decidendi* of a superior court must be followed and is binding on the court below. Over the years certain guidelines have been established on the application of the principle and amongst them is whether based upon the factual matrix of the case the point or question for determination is sufficiently and closely identifiable with the *ratio decidendi* of the binding precedent.

Hence if the factual matrix is not sufficiently and closely identifiable and is distinguishable then it may fall outside the purview of the principle and it is permissible for the lower court to discount its binding effect.

In the instant case that was what was precisely urged by learned counsel of the applicant on me when he strenuously argued that whether or not the principle of *stare decisis* is applicable is pivoted on a determination of the objective of the particular detention statute – in that of ascertaining whether its objective permits consideration of past association of the impugned criminal activities – if it does as under the provisions of the Dangerous Drugs Act (Special Preventive Measures) Act 1965 then it clearly relates to the question of sufficiency or relevancy of facts within the Minister's ambit and hence not questionable but not otherwise.

The contention of learned counsel of the importance to consider and evaluate the object of the particular statute is not without force and hence it behoves upon me to ascertain by adopting an analytical approach of the basis of the Supreme Court decision in *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v. Chua Teck (supra)* and its binding nature on this court.

A starting point in the analysis is that *Chua Teck*'s case revolves round a detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter called the Drugs Act). The power to order detention is found under s. 6(1) of the Drugs Act and a careful perusal of same would reveal the

presence of the word "has been" and hence it cannot be disputed that the Minister is empowered to take into consideration the past association of the detenu with any activity relating to or involving in the trafficking in dangerous drugs.

Section 6(1) is reproduced:

> 6. Power to order detention and restriction of persons.
>
> (1) Whenever the Minister, after considering:
>
> a) the complete report of investigation submitted under subsection (3) of section 3; and
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> b) the report of the Inquiry Officer submitted under subsection (4) of section 5,
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years.

By reason of the express empowerment to take into consideration the detenu's past association it invariably falls within the ambit of the subjective satisfaction of the Minister for which the court cannot intrude.

The Supreme Court in arriving at its ruling adopted the rationale as laid out by the judge of the court of first instance. Justice LC Vohrah in providing the rationale stated at para. I p. 118 and paras A to B p. 119:

> In my view the question of staleness or remoteness forming the first ground of challenge goes to the question of sufficiency or relevancy of the facts, an enquiry upon which the Court cannot embark as it is based on the subjective satisfaction of the Minister who is making the first order of detention in the interest of public order under s. 5(1) of the Act, can take into account the applicant's past association "with any activity in relation to or involving the trafficking in dangerous drugs" (see *Ee Kim Huan v. Inspector General of Police & Ors* in Seremban Criminal Application No. 44/(54)-59-88).

Turning to the factual matrix herein the detention is made under the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (hereinafter called the Emergency Ordinance) – a statute which is different from the Dangerous Drugs (Special Preventive Measures) Act 1985. The powers of detention under the Emergency Ordinance is found in s. 4(1) which provides:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a "detention order") directing that that person be detained for any period not exceeding two years.

Upon reading the wording thereof a notable striking feature is the absence of the word "has been" as appears in the Drugs Act. The absence thereof is of extreme importance as it has the effect of excluding the past association of the detenu with criminal activities as falling exclusively within the subjective satisfaction of the Minister so as to exclude the court's inquiry.

Hence by reason thereof a distinguishing feature arises resulting in the court being justified in departing from the principle of stare decisis of *Chua Teck*'s case. I can safely say that *Chua Teck*'s case in establishing that the question of staleness or remoteness goes to the question of sufficiency or relevancy of the facts and hence falling within the subjective satisfaction of the Minister is only confined to cases of detention made in pursuance to the Dangerous Drugs (Special Preventive Measures) Act 1985 and cannot be applicable to detentions made under any other statutes.

In short it is my considered view that the court is empowered to examine the relevant statute and determine its objective and scope to ascertain whether it falls within the subjective satisfaction of the Minister to preclude the court's adjudication.

Justice LC Vohrah in *Chua Teck*'s case *(supra)* did in fact state that the court is not precluded from examining whether the detention falls within the scope of the law under consideration. At p. 119 para. E to H he stated as follows:

> Although it is clear on the authorities that the court is precluded from adjudicating on the sufficiency of the satisfaction of the Minister it can however examine whether the detention falls within the scope of the law under consideration. The Minister purported to act pursuant to the powers conferred under s. 6(5)(a) which relates to his subjective satisfaction being based on the complete report of investigation submitted under sub-s. (3) of s. 3 and on the report of the inquiry officer submitted under sub-s. (4) of s. 5 and when the Minister considered the report of the advisory board which contained a specific recommendation for the further detention of the applicant, he had in fact taken into account extraneous material which the law did not contemplate he should consider and he had, in my view, purported to exercise powers beyond the ambit of s. 6(1). As there was no strict compliance with the provisions of the law affecting the personal liberty, it was my judgment that the applicant was entitled to be granted his application and I accordingly ordered that the writ of *habeas corpus* be issued for him to be set free.

The scope of the law alluded to by his Lordship would to my mind also include the objective and since the objective of the Emergency Ordinance excludes consideration of past association of the detenu's criminal activities as falling exclusively within the subjective satisfaction of the Minister the Court is not precluded from questioning the staleness or remoteness of the detenu's criminal activities in relation to the detention order.

By taking into account extraneous material which the law did not contemplate he should consider he had exercised powers beyond the ambit of s. 4 of the Emergency Ordinance.

I must also stress that the point of delay though not expressly worded as such was raised by the detenu in para. 6(i) of his affidavit affirmed on 22 December 2001. The thrust of the delay complaint was that the last of the prejudicial criminal activities of the applicant was on the 26 February 2000 whereas the Detention Order was only made on 8 November 2001 – a lapse of time of some 1 year and 9 months and there was an absence of any offending act during the time period which places an obligation on the respondent to explain the delay.

The respondent ought to have been alerted by the averment raised in para. 6(i) thereof and furnished explanation for delay, which unfortunately he has failed to do.

The requirement that any material delay has to be explained is a readily recognizable principle in both criminal and civil law – *Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638; *Malaysia Bar v. Tan Sri Dato' Abdul Hamid bin Omar* [1989] 2 MLJ 281.

It is now too late in the day for the Minister to be proffered to furnish an explanation for the delay. As was stated by Bagwati J in *SK Serajul v. State of West Benjal* AIR [1975] SC 1517 at p. 1518:

> Mr. Chatterjce learned counsel appearing on behalf of the State of Bengal, contended that the State was not expected to render any explanation in regard to the delay in making the order for detention and arresting the petitioner because no such complaint was made in the petition. But this is hardly an argument which can avail the State when it is called upon to answer a rule issued on a petition for a writ of *habeas corpus*. It is the obligation of the State of the detaining authority in making its return to the rule in such a case to place all the relevant, facts before the Court and if there is any delay in making the order for detention or in arresting the detenu which is *prima facie* unreasonable, the State must give reasons explaining the delay.

As I had earlier found that the detenu had alluded in para. 6(i) on the point of delay though not expressly worded it becomes all the more vital for the respondent to respond and place all the available evidence and explanations to the court, the failure of which would invariably result in the court to conclude that the subjective satisfaction of the Minister is not genuine and is colourable.

In the circumstances I find that there has been inordinate delay between the detention order and the criminal activities of the detenu as contained in the allegations of fact which makes the 1st respondent's subjective satisfaction not genuine or colourable and by reason thereof as preventive detention is a serious affront to personal liberty the court has no discretion but to accede to the applicant's prayers and I accordingly order that a writ of *habeas corpus* be issued to him to be set free.